Critically, manual processes cannot support the form of mass-scale entry and competition necessary for entrants to compete with a BOC's ability to offer interLATA services. Customers expect and deserve the ability to rapidly obtain telecommunications services from the providers of their choice, with a minimum of inconvenience and cost. Only an automated process can satisfy this expectation. Fortunately, such a process is in use today and can be easily modified to accommodate this need.

IV. BELLSOUTH STILL DOES NOT COMPLY WITH SECTION 271(C)(1)(A)

In order for the Commission to approve a BOC's application to provide in-region interLATA services, a BOC must satisfy the requirements of either Section 271(c)(1)(A) or 271(c)(1)(B).[40] Here, BellSouth contends that it has met the requirements of Section 271(c)(1)(A), or, Track A. Track A requires the presence of a facilities-based competitor; that is, when a BOC relies upon one or more local competitors to support its application, those competitors must serve both residential and business subscribers "either exclusively over their own telephone exchange service facilities or predominately over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[41]

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40 47 U.S.C. § 271(d)(3)(A).

41 47 U.S.C. § 271(c)(1)(A).

A. The *De Minimis* Number of Facilities-Based Residential Lines Does Not Satisfy Section 271(c)(1)(A)'s Requirement that a BOC Face an Actual Commercial Alternative

In the instant application, BellSouth cites six wireline CLECs alleged to be providing competitive facilities-based local exchange service in Louisiana: ACSI (d/b/a e.spire), AMC, Hyperion, KMC, Shell and AT&T.[42] Of these carriers, however, KMC is the only carrier even alleged to provide facilities-based *residential* services.[43] This lack of facilities-based competition in the residential market is one of the primary reasons that BellSouth's application must fail Track A once again.

It is significant that BellSouth does not provide any evidence of the nature of the residential service KMC allegedly provided through its own facilities. In fact, CompTel understands that KMC (a CompTel member company) is filing comments today demonstrating that it does not serve *any* residential customers in Louisiana on a facilities-based basis. This fact from the carrier itself refutes BellSouth's claim of facilities-based residential competition and requires denial of the application.

Even if BellSouth's representation regarding KMC were correct, which it is not, BellSouth still would fail the "actual competition" test. In the *SBC Oklahoma Order*, the Commission concluded that the statutory term "competing provider" requires that there

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[42] BellSouth Application at 4- 6. BellSouth also lists five PCS carriers to support its Track A application: AT&T, Sprint Spectrum, PrimeCo, MereTel, and PowerTel.

[43] BellSouth Application at 5.

be an actual commercial alternative to the BOC.[44] Importantly, the Commission has recognized that "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'"[45] If actual facilities-based competition is to have any meaning, there must be more than a *de minimis* level of service to residential subscribers. As revealed in the confidential exhibits, the "small number" of customers KMC is alleged to serve is unquestionably *de minimis*.[46] In fact, BellSouth has provided number portability to only a single residential line in the entire State of Louisiana.[47]

In its discussion of *de minimis* service in the *Ameritech Michigan Order*, the Commission posited that serving "thousands of access lines" might be sufficient to overcome the *de minimis* threshold.[48] On the other hand, common sense dictates that the handful of lines relied upon by BellSouth in this application is undoubtedly *de minimis*. Such a small number of lines does not provide any evidence that customers have a viable commercial alternative to the BOC's residential service. Legally, KMC's level of service is indistinguishable from the insignificant level provided by Brooks Fiber in Oklahoma. Therefore, even if BellSouth had correctly reported KMC's service, KMC would not

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44 *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, FCC 97-228 ¶ 13 (rel. June 26, 1997) ("*SBC Oklahoma Order*").

45 *Ameritech Michigan Order* at ¶ 77.

46 BellSouth Application, Wright Conf. Ex. C; Wright Conf. Aff. ¶ 118.

47 BellSouth Application at 57.

48 *Ameritech Michigan Order* at ¶ 78.

qualify as an actual competitive alternative to the BOC, and thus, is not a competing provider as required by the statute.

Indeed, BellSouth includes a recent quotation from Chairman Kennard that "the goal of the 1996 Act is not to ensure that competitors have taken a certain amount of business from the Bell Operating Company, but rather to bring the benefits of competition to consumers."[49] CompTel agrees that the goal of Section 271 is to bring the benefits of competition to consumers. However, there are two types of "consumers:" business and residential. Both types deserve the benefits of competition. Thus, both need to have viable facilities-based alternatives before Track A is satisfied.

B. BellSouth May Not Satisfy the "Predominantly Facilities Based" Test Through Residential Service That is Exclusively Resale

To satisfy Section 271(c)(1)(A), a BOC must show that the carrier or carriers are providing such services "predominantly" or "exclusively" through their own facilities. BellSouth claims that it can satisfy this standard even if *no* carrier is using any of its own facilities to serve residential customers. Track A, BellSouth claims, "does *not* require that both classes of subscribers be served on a facilities basis."[50] This statement flatly contradicts Section 271(c)(1)(A) and (rightly) has *not* been endorsed by the Commission. Track A requires that both residential *and* business subscribers be served by a competing provider, and that "such telephone exchange services", *i.e.*, both classes of service –

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49 *Id.* at 9, quoting Letter from William E. Kennard, Chairman, FCC, to Sen. John B. Breax, dated July 7, 1998 at 2.

50 *Id.* at 7.

residential *and* business, must be offered exclusively or predominantly over the facilities of the competitor.[51]

Specifically, as CompTel has stated in the past, two separate tests are implicit in the language of Section 271(c)(1)(A): the facilities-based carrier must be providing (1) a telephone exchange service to residential subscribers; and (2) a telephone exchange service to business subscribers.[52] Thus, residential customers must be served either exclusively or predominantly over the facilities of a competing provider. This interpretation not only follows logically from the statute, but also is the only way to accomplish Congress' goal of breaking the BOCs' bottleneck control over the local loop.

Indeed, Congress included the facilities-based requirement in Track A in order to encourage the BOCs to assist in the development of facilities-based competition for both residential *and* business customers.[53] Obviously, Congress believed that a competing facilities-based provider offered a greater degree of protection against BOC abuses than did a carrier dependent upon the BOC's network through resale. There is no reason to entertain the notion that Congress intended the benefits of facilities-based competition to accrue only to business customers. In keeping with the overarching goal of Section 271, the Commission must require a facilities-based competitor for both business *and* residential subscribers in order to promote actual facilities-based local competition.

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51 47 U.S.C. § 271(c)(1)(A).

52 *In the Matter of Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Oklahoma*, Reply of the Competitive Telecommunications Association, CC Docket No. 97-121, filed May 27, 1997, at 10.

53 *See* H.R. Conf. Rep. No. 104-458. 104th Cong., 2d Sess. at 148 (1996) ("*Joint Explanatory Statement*"). This statement made clear that Congress anticipates facilities-based competition is possible in the residential market if a BOC complies with its obligations under Section 251 of the Act.

In its application, BellSouth relies upon carriers offering residential services on a resale basis.[54] However, there are no competing providers of residential services as required under the statute. Section 271(c)(1)(A) requires that a BOC provide "access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . . to residential *and* business subscribers."[55] Providing residential services only via resale does not satisfy the plain language of the statute.

In its application, BellSouth cites to a congressional letter from Chairman Kennard for the proposition that Track A does *not* require that residential subscribers be served on a facilities basis, as long as competitors are providing predominantly facilities-based service in the aggregate.[56] Chairman Kennard's letter, however, stresses that Section 271(c)(1)(A) must be applied "to any specific set of facts in a practical and common sense manner that is informed by the overall goal of section 271. . ."[57] In other words, the Commission must keep in mind that Congress envisioned facilities-based competition, not solely resale competition, as the way to protect against BOC abuses and to bring innovative services to consumers. Given the different opportunities available if one controls its own network, real facilities-based competition is the only way to ensure meaningful local competition. In a scenario in which there is not any actual facilities-

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54 As shown above (pp. 22-23), although BellSouth alleges KMC provides facilities-based services to residential customers, it actually is a resale carrier to residential customers.

55 47 U.S.C. § 271(c)(1)(A).

56 BellSouth Application at n. 5. Letter from William E. Kennard, Chairman, FCC, to Sen. Sam Brownback, dated April 22, 1998. The Chairman recognizes, nonetheless, that viewing the alleged competitive situation in the aggregate may produce unintended, anomalous results under Track A.

57 Chairman Kennard's April 22 Letter at 2.

based competition in the residential market, the "common sense" application of Section 271 would preclude the fulfillment of Track A.

CompTel agrees with Commissioners Ness and Furchtgott-Roth that there must be facilities-based competition in the residential market as well as the business market in order for a BOC to succeed under Track A.[58] Commissioner Ness succinctly noted, Track A contemplates a situation in which "both residential *and* business subscribers are being served 'predominantly' over the facilities of a carrier other than the Bell operating company."[59] Similarly, Commissioner Furchtgott-Roth interprets the statute as requiring that "at least one competitor . . . serve business subscribers 'predominantly over their own telephone exchange service facilities' and at least one competitor . . . . serve residential subscribers 'predominantly over their own telephone exchange service facilities.'"[60] Under this interpretation, which CompTel agrees is the correct interpretation, if no competitor offers predominantly facilities-based service to residential customers, Track A would not be satisfied.

C. PCS Service is Not a Substitute for Wireline Local Exchange Service at This Time

BellSouth claims that, in addition to satisfying Track A through the competing activities of six wireline carriers, it also satisfies Track A based upon the existence of

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58 Letter from Susan Ness, Commissioner, FCC, to Sen. Sam Brownback, dated April 22, 1998; Letter from Harold Furchtgott-Roth, Commissioner, FCC, to Sen. Sam Brownback, dated April 22, 1998.

59 Commissioner Ness' April 22 Letter at 2 (emphasis in original).

60 Commissioner Furchtgott-Roth's April 22 letter at 1.

PCS carriers in Louisiana. The Commission concluded in the *BellSouth Louisiana Order* that the presence of a PCS provider in a particular state could be considered a "facilities-based competitor" only if the PCS provider offers telephone exchange service as a competing provider.[61] At that time, however, the Commission noted that PCS was not yet "an actual commercial alternative" to the BOC,[62] but rather still in the process of transitioning from a complementary telecommunications service to a competitive equivalent to wireline services. As Chairman Kennard emphasized in his July 7 Letter, the BOC must demonstrate that PCS is used to *replace*, rather than merely *supplement* local wireline service.[63]

At most, BellSouth's studies indicate that PCS *could* be an alternative for a small, mobile portion of the population.[64] BellSouth's study purports to show that 6 percent (10 percent of business users and 4 percent of personal users) of PCS customers subscribe to PCS *instead of* wireline service.[65] This percentage of PCS users in no way indicates that PCS has become an actual competitive alternative to wireline service. Further, the claim that "7 to 15 percent of BellSouth's local residential customers in New Orleans *could* consider switching (emphasis added)"[66] to PCS is sheer speculation. It does not even suggest that PCS actually *is* considered a competitive equivalent of wireline local service.

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61 *BellSouth Louisiana Order* at ¶¶ 72 and 73.

62 *BellSouth Louisiana Order* at ¶ 73, citing *SBC Oklahoma Order* at ¶ 14; *Ameritech Michigan Order* at 75.

63 Chairman Kennard's Letter to Sen. Breaux at 1.

64 BellSouth Application at 12-13.

65 *Id.*

66 *Id.* at 14.

PCS continues to satisfy different customer needs than wireline service and still is priced to reflect such differences. BellSouth has not shown that PCS *generally* is an actual substitute for wireline service. While CompTel does not dispute the idea that PCS-based local service could one day replace wireline local service, that day is not today. Therefore, the PCS-based service BellSouth relies upon does not satisfy Track A.

V. GRANT OF BELLSOUTH'S APPLICATION IS NOT CONSISTENT WITH THE PUBLIC INTEREST

In order to obtain Section 271 authorization to provide in-region, interLATA service, the BOC must show that the authorization is "consistent with the public interest, convenience and necessity."[67] The statute requires an independent "public interest" finding, separate and apart from findings on the remainder of Section 271's requirements. Indeed, the Senate has confirmed that the public interest test has a meaning distinct from the other requirements of Section 271.[68] Thus, even if BellSouth were to meet Congress' other requirements for interLATA entry - which it does not - the Commission still should reject BellSouth's application as contrary to the public interest. Simply stated, the conditions for a fully-functioning "all services" market do not exist, and moreover, it is BellSouth *itself* that has blocked the development of this competition.

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67 47 U.S.C. § 271(d)(3)(C).

68 *See* 141 Cong. Rec. S 7960-71 (June 8, 1995). Senator McCain's amendment, to deem the public interest test satisfied by implementation of the checklist, was rejected.

A. The Commission has Broad Discretion in Implementing the Public Interest Test in Section 271.

Although the statutory language confirms that the public interest test is distinct and in addition to the other Section 271 requirements, the precise meaning of the "public interest, convenience and necessity" defies definition. Thus, in implementing the public interest test, the Commission must look to case law in which the courts have given the Commission broad discretion to exercise its judgement in determining whether the application benefits consumers.[69] The courts have also required that the Commission apply the public interest test consistent with Congress' purpose in passing the legislation.[70]

Here, Congress' purpose in passing the Act, and specifically Section 271, is to promote competition for the benefit of consumers in the marketplace for local telephone services. In other words, Congress wanted to vest in the Commission the discretionary power to deny BOC entry into the long distance market until the goal of substantial competition in the local marketplace is realized. Accordingly, the Commission must examine the instant application with an eye toward whether it benefits consumers in this respect.

To date, the Commission has rejected four BOC applications under Section 271 without applying the public interest test. In the *Ameritech Michigan Order*, for example, the Commission stated that it need not address the public interest issue because

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69 *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *United States v. FCC*, 652 F.2d 71 (D.C. Cir. 1980); *Nat'l. Broad. Co. v. United States*, 319 U.S. 190 (1943).

70 *See, e.g., NAACP v. FCC*, 425 U.S. 662 (1976); *Western Union Div. v. United States*, 87 F. Supp. 324 (D.D.C. 1949), *aff'd* 338 U.S. 864 (1949).

Ameritech failed to demonstrate that it had satisfied either the competitive checklist or Section 272.[71] The same is true with BellSouth's second application for Louisiana.

Nevertheless, the Commission has provided guidance as to some of the factors relevant to its public interest analysis. As an initial matter, the Commission correctly concluded that Congress "granted the Commission broad discretion under the public interest requirement in section 271 to consider factors relevant to the achievement of the goals and objectives of the Act."[72] As stated above, these goals include the opening of all telecommunications markets to competition and the ultimate replacement of government regulation with market discipline.[73] Accordingly, the Commission "should focus on the status of market-opening measures in the relevant local exchange market,"[74] and not, as BellSouth asserts, only on the interLATA market.[75]

B. BellSouth's Public Interest Analysis Conflicts With Congress' Intent Underlying Section 271

In the *Ameritech Michigan Order*, the Commission specifically stated: "We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market."[76] Rather, the appropriate inquiry, as mandated by Congress, is focused primarily on the local market and "on the basis of an adequate factual record that the BOC has undertaken

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71 *Ameritech Michigan Order* at ¶ 6.

72 *Id.* at ¶ 385.

73 *Id.* at ¶ 386.

74 *Id.* at ¶ 385.

75 *See* BellSouth Application at 74-76.

76 *Ameritech Michigan Order.* at ¶ 386.

all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[77]

By focusing on the local market, the Commission should strive to ensure equality of opportunities to compete in both the local and the long distance markets. In evaluating whether the grant of BellSouth's application is in the public interest, the Commission must weigh the miminal potential competitive benefits of BellSouth's entry into the long distance market against the anticompetitive risks posed by such entry. Given that the long distance market is already robustly competitive, BellSouth's entry into the long distance market would produce only marginal benefits. By contrast, there is not the same competition in the local marketplace because BellSouth still has the incentive and ability to exercise its monopoly power. Because the risks of harm to the development of local competition far outweigh the marginal competitive benefits for the long distance market, grant of BellSouth's application would not be in the public interest.

Despite the Commission's unequivocal rejection of the argument in its *Ameritech Michigan Order*, BellSouth's discussion of the public interest standard displays an extreme lack of reading comprehension. BellSouth's concentration on the alleged benefits it will bring to the interLATA market ignores Congress' intent, in the passage of Section 271, to delay the BOCs' entry into the interLATA market in favor of providing the BOCs with the incentive to ensure that the local markets are open to competition. While BellSouth's entry into the already competitive interLATA market would produce marginal benefits, consumers will surely benefit more from the elimination of the BOCs' local monopoly that has yet to occur. The public interest test allows the Commission to

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77 *Id.*

use its expertise to ensure that BellSouth and other BOCs to open their local monopoly networks to competition.

C. The Local Market is Not Sufficiently Open to Support BellSouth Entry into the In-Region, InterLATA Market

It is vital that the Commission not act prematurely, when the local market is not irreversibly open to facilities-based competition, especially in the residential market. Granting BellSouth's application would eliminate its incentive to implement the interconnection, unbundling and resale provisions of Section 251. The anticompetitive advantage that would accrue to BellSouth if allowed into the interLATA market at the present time would be devastating to the development of competition in all telecommunications markets.

As CompTel has noted in the past, if many local subscribers prefer "one-stop shopping" for local and long distance service, then approval of BellSouth's application at this time would cede the "one-stop" shopping market to BellSouth. As a result of a 14 year history of competition in the interLATA market, BellSouth would be able to draw upon established wholesale and retail mechanisms to provide interLATA service to prospective long distance customers almost immediately in every geographic location. In contrast, competitors do not have equivalent opportunities in the local market, so no carrier would be able to match BellSouth's ability to provide "one-stop shopping" for local and long distance service. The Commission should not allow BellSouth to extend its local monopoly power into the long distance market.

CONCLUSION

For the foregoing reasons, BellSouth's second application for authority to provide in-region interLATA services in Louisiana should be denied. BellSouth has neither satisfied the competitive checklist nor met the requirements of Track A. Furthermore, it would not be in the public interest to grant BellSouth's application. Accordingly, the Commission should deny the BellSouth request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Melissa M. Smith, hereby certify that on this 4th day of August, 1998, I caused true and correct copies of the foregoing OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION to be served via hand delivery and U.S. mail, first-class postage prepaid, upon those persons listed below.

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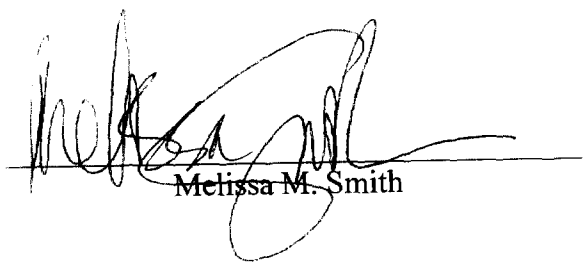

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CompTel

Broadening the Base:

Combining Network Elements To Achieve Widespread Local Competition

July 1998

CompTel

Broadening the Base:

Combining Network Elements To Achieve Widespread Local Competition

This white paper is sponsored by the Competitive Telecommunications Association (CompTel). CompTel is a national industry association representing a broad spectrum of members pursuing a variety of strategies to compete in the local, long distance and information services markets. Of paramount interest to CompTel and its members is assuring that the conditions for competition exist across the entire market, bringing the benefits of competition to residential and business consumers throughout the nation.

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I. Introduction

The Telecommunications Act of 1996 (the Act) was adopted with a goal of robust competition for all telecommunication services, across all markets, for all consumers. To achieve this vision of broad competition, Congress mandated that incumbent local exchange carriers (ILECs) open the existing network to any entrant on non-discriminatory terms and conditions, with prices based on cost. Under these conditions, this national network resource would provide the foundation for rapid entry across all market segments.

The two years since the Act's passage have confirmed that cost-based access to the existing network is the fundamental condition necessary for broad-scale entry and competition. The incumbent LEC's exchange network is simply to vast and complex to replicate on a ubiquitous scale. Equally valid has been the lesson that competitors must have a practical ability to combine network elements, as well as having access network elements individually.

The purpose of this white paper is to address the access that entrants require to combine network elements in a manner which will support *widespread* and *rapid* local competition. The conclusion is straightforward: wherever possible, entrants must have access to the same electronic systems that the ILECs use to manage and combine network elements if the core policies of the Act are ever to be achieved. The facts are that contemporary ILEC networks are automated -- with many functions defined and controlled through software-based systems -- and that providing entrants nondiscriminatory access to these same systems efficiently combine network elements will be critical to the success of local competition.

Although the access to combine elements is a generic issue that affects a number of network element combinations, the principle focus of this white paper concerns combining

the basic components of exchange service: the loop, local switching and shared transport.[2] As explained below, a software-based solution known as "recent change" can be readily adapted to provide entrants access to combine these particular network elements in a nondiscriminatory manner. This electronic solution stands in stark contrast to the proposals of the monopoly ILECs that involve needlessly complex, manual systems and unnecessary collocation requirements that serve no purpose beyond inflating their competitors' costs. Of course, the consequence of complicated and expensive systems to combine network elements would be truncated local competition, with fewer choices and higher prices for consumers -- and higher profits for ILECs.

In the paper which follows, CompTel demonstrates that access to the recent change capabilities of the local switch to combine network elements will be necessary if the Act's promise of widespread and rapid competition is to become a reality. Without an automated system to combine elements, mass market competition for average consumers will not develop. And, if widespread local competition does not develop, the Act's parallel policies reforming access charges, universal service and the removal of interLATA restrictions on the Bell Operating Companies will fail. But the ultimate harm will be suffered by the intended beneficiary of the Act -- the American consumer -- whose prices and service choices will be artificially constrained.

II. The Importance of Achieving Widespread Competition

A. Background

The federal Act imposes a clear and unambiguous requirement on incumbent local exchange carriers to make the existing network available to entrants on a non-discriminatory

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[2] The remaining network elements necessary to provide local exchange and exchange access service (such as signalling, operator functions and directory access) can typically be accessed through the local switching network element for an additional charge.

basis, at cost-based rates. The cornerstone of this obligation is described in Section 251(c)(3):

> Unbundled Access - The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services.

This provision makes clear that entrants have a right to access network elements individually, as well as a right to combine network elements to provide service. Importantly, in its decision implementing the local competition provisions of the Act,[3] the Federal Communications Commission (FCC) did not directly address how entrants would be provided access to combine elements obtained from an ILEC. Rather, the FCC ordered the ILEC to combine elements on behalf of the entrant (compensated for the cost that the ILEC incurred) and, where network elements were already combined, the FCC prohibited the disruption of such combinations, unless requested by the entrant.[4] Because the FCC expected that the ILECs would combine requested elements, it was unnecessary for it to also define the access methods that an ILEC would provide an entrant to combine the elements itself.

On appeal, the Eighth Circuit vacated the FCC's rules, finding that the federal Act did

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[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996), aff'd in part and rev'd in part, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted ("Local Interconnection Order").

[4] 47 CFR § 51.315(b) (1996) provided that: "Except upon request, an incumbent LEC shall not separate requested network elements that the ILEC currently combines."